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ALEXANDER L. STEVENS
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No.

in the
Supreme Court
of the
United States

OCTOBER TERM, 1983

CARL L. BRIMM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I

WHERE AN INDIVIDUAL IS CHARGED WITH VIOLATING THE LOTTERY LAWS, BUT THE ALLEGED "SCHEME" OPERATES NO DIFFERENTLY THAN THOSE CONTESTS OPERATED ON A REGULAR BASIS BY FAST FOOD FRANCHISES, NO VIOLATION OF LAW HAS BEEN COMMITTED.

II

WHERE A FEDERAL STATUTE SETS OUT SEVERAL SEPARATE AND DISTINCT WAYS IN WHICH ONE MAY VIOLATE THE LAW, IT IS A VIOLATION OF FIFTH AMENDMENT DUE PROCESS FOR THE GRAND JURY TO CHARGE COMMISSION OF THE CRIME BY ONE OF THOSE METHODS, AND THE GOVERNMENT, AT TRIAL, TO PROVE VIOLATION BY A TOTALLY DIFFERENT METHOD.

PARTIES INVOLVED

In addition to the United States of America, which was the prosecution in the trial court, appellee in the appellate court and respondent herein and Carl L. Brimm, who was the defendant in the trial court, appellant in the appellate court and petitioner herein, there were two co-defendants in the trial court.

Janice A. Brimm and Dolores R. Canton

Janice A. Brimm was an appellant below.

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I

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**PETITION FOR WRIT OF CERTIORARI
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Carl L. Brimm, through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on July 12, 1983.

OPINIONS BELOW

The opinion of the Eleventh Circuit, reproduced and attached hereto as Appendix "A", is unreported. The judgment and sentence of the United States District Court, Southern District of Florida, was entered on December 16, 1981.

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit was entered on July 12, 1983. A petition for rehearing by the panel was filed timely, and was denied by order dated September 6, 1983. Copies of the petition for rehearing and the order of denial are reproduced and attached hereto as Appendix "B" and "C", respectively. This petition for a writ of certiorari was filed within sixty days of the denial of the petition for rehearing. The jurisdiction of this court is invoked under 28 U.S.C. §1254 and Supreme Court Rule 17.1(a) and (c).

CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution:

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISION

Title 18 United States Code, Section 1302:

§1302. Mailing lottery tickets or related matter

Whoever knowingly deposits in the mail, or sends or delivers by mail:

Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket

or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Any article described in section 1953 of this title—

Shall be fined not more than \$1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

STATEMENT OF THE CASE AND FACTS

On March 24, 1981, a five count indictment was filed in the Southern District of Florida charging Carl L. Brimm and two co-defendants with sending a letter in the mail concerning a lottery, gift enterprise, and similar scheme offering prizes depending in whole or in part on lot or chance, in violation of 18 U.S.C. §1302 and 2, and with conspiracy to violate 18 U.S.C. §1302.

On June 8, 1981, the Government filed a superseding indictment, charging conspiracy to violate 18 U.S.C. §1302, in that the three defendants conspired "to knowingly deposit and send in the mail letters and circulars concerning a lottery, gift enterprise and similar scheme offering prizes dependent in whole or in part upon lot or chance." Counts II through V of the indictment charged them with knowingly depositing and sending "in the mail checks, drafts, and money orders for the purchase of a share, chance and interest dependent on the event of a lottery, gift enterprise and similar scheme offering prizes dependent in whole or in part upon lot or chance." Counts VI through IX of the indictment charged them with sending in the mail "a letter concerning a lottery, gift enterprise, and similar scheme offering prizes dependent in whole or in part upon lot or chance . . ." A copy of the superseding indictment is reproduced and attached hereto as Appendix "D".

On June 16, 1981, Carl L. Brimm pled not guilty to the superseding indictment. On October 5, 1981, jury trial commenced in the Southern District of Florida before the Honorable Norman C. Roettger. The jury found Brimm guilty of all nine counts of the indictment. On November 3, 1981, Brimm filed a motion for new

trial alleging that the Government failed to establish any violation of 18 U.S.C. §1302. The motion was denied.

On December 16, 1981, Carl L. Brimm was sentenced to eighteen (18) months incarceration on Count I. On Counts II through IX, he was sentenced to two years incarceration. The court suspended the execution of sentence on Counts II through IX and placed Brimm on probation for a period of three years for each count. It was further ordered that the three year terms of probation were to run concurrently with each other and consecutively to the sentence on Count I. The court fined Brimm a total of \$18,000 (\$10,000 for Count I, and \$1,000 for each of the remaining eight counts), and finally, created a special condition of probation that he not engage in any illegal mail order business during the term of probation.

Carl L. Brimm timely filed an appeal to the Eleventh Circuit. On July 12, 1983, that court entered a two page non-published opinion affirming in part and reversing in part. Brimm's convictions on Counts II, III, IV and V were reversed for insufficient evidence. However, convictions on the remaining counts were affirmed. (See appellate opinion, Appendix "A").

Counts II through V of the indictment, on which the convictions were reversed, alleged that Brimm mailed monies to a bank in New York for the purchase of a share and chance in a lottery, gift enterprise, and similar scheme offering prizes dependent in whole or in part upon lot and chance. At trial, defense counsel stipulated that Brimm did in fact mail the checks. By stipulation,

numerous documents were introduced to show that checks and money orders were sent to a bank in New York.

The Government also introduced into evidence circulars received by four people, Luzitano (Count VI), Unrue (Count VII), Fields (Count VIII), and Parson (Count IX). Defense counsel stipulated that they received the circulars but maintained that the circulars did not violate any law.

The circulars advertised that if the recipient followed the directions, he potentially could earn \$625,000. In order to join the club, the recipient was to send \$5 to the first name listed in the advertisement. In return for sending \$5, the new member would receive four valuable money-making reports. The advertisement also instructed the member to send \$20 to International Enterprises, in return for which he would receive fifty copies of a similar advertisement and fifty names on a mailing list. When the \$20 was mailed, the member's name would appear second on the list of three names listed in the advertisement. When his name appeared in the first position, he would receive the \$5 membership fee from all new members.

The advertisement also informed recipients that upon mailing \$20 to International Enterprises, they would receive a complimentary holiday for two in one of several cities. The package included free hotel and entertainment, but not transportation. The hotels included Ramada Inn, Holiday Inn, Rodeway Inn, Westward Ho and Travel Lodge, and the choice of cities included Las Vegas.

After introducing the advertisement into evidence, the Government proceeded to call four witnesses who each sent \$20 in response to the advertisement. However, none of these individuals (T. Wilson, Church, C. Wilson or Searcy), was mentioned in the indictment. They all testified that they mailed \$5 to the first name of the advertisement plus \$20 to International Enterprises. They all testified to receiving the four money making reports and the free holiday for two.

Government witness Popiell testified that the circulars sent to Nat Associates were forwarded to Carl L. Brimm through a mail delivery service in Chicago. Government witnesses Devrol and Philabaum testified that they worked for Brimm and that they mailed the circulars according to his instructions.

Government witness Pritchard, a postal inspector in Albany, New York, testified that he received one of the circulars in Albany in 1979. After it was introduced into evidence, Pritchard was allowed to testify over defense objection that in his opinion the circular was a chain letter.

Government witness Maxwell, a postal inspector, testified that he told one of Brimm's co-defendants that she must stop mailing the circulars. He offered no testimony relevant to Carl L. Brimm.

Finally, Government witness Barron, another postal inspector, testified that in his opinion, a chain letter was a lottery under 18 U.S.C. §1302.

The defense called to the stand Robert Marks, a friend of Carl Brimm's, who testified that he was interested in becoming involved in the mail order business with Brimm, so they went together to an attorney to determine whether it was legal to mail the circular. The trial court refused to allow Marks to testify about the attorney's advice.

Carl Brimm took the stand in his own defense and testified that in his opinion the circular was legal; that he went to an attorney for advice as to the legality of the circular; that in return for the \$5 sent to the first person on the list, the individual would receive four money making reports; and that in return for the \$20 sent to International Enterprises, the individual would receive a free holiday vacation.

The two co-defendants also took the stand and testified, essentially, that they worked for Carl Brimm; that the lottery was not their idea; and that they believed they were working for a legitimate organization.

REASONS FOR GRANTING THE WRIT

I

THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BUT SHOULD BE DECIDED BY THIS COURT IN LIGHT OF RECENT SOCIAL CHANGES IN THAT THE SCHEME ALLEGED IN THE INDICTMENT WAS NOT A LOTTERY OR GIFT ENTERPRISE IN VIOLATION OF 18 U.S.C. §1302 BECAUSE RECEIPT OF THE PRIZE WAS NOT BASED ON LOT OR CHANCE.

The last statement by this Court on lotteries was made in *United States v. Halseth*, 342 U.S. 277 (1952). In the past thirty years, Since *Halseth*, there have been substantial social changes and advances, not the least of which is the proliferation of contests seen daily in newspapers, magazines, television advertisements by fast food and other franchise businesses. The "scheme" involved in this case is every bit as legitimate as those other "schemes" if not more so. It is time for a decision from this Court setting out the parameters of what is and what is not a lottery.

The indictment in this case charged Carl L. Brimm and two co-defendants with nine counts of various violations of 18 U.S.C. §1302. Count I of the indictment charged conspiracy to violate 18 U.S.C. §1302, by knowingly depositing and sending through the mail letters concerning a lottery or gift enterprise and

knowingly depositing in the mail checks, drafts and money orders for the purchase of a share and chance in a lottery and gift enterprise. Counts II through V, the convictions of which were reversed on appeal, charged the substantive offenses of knowingly depositing in the mail checks, money orders and drafts for the purchase of a share or chance in a lottery or gift enterprise. Counts VI through IX charged the substantive offense of sending through the mail a letter concerning a lottery or gift enterprise.

In order to sustain convictions on any counts of the indictment, the Government's first burden is to prove that the alleged scheme was in fact a lottery, or gift enterprise as prohibited by 18 U.S.C. §1302. Although the Government attempted to prove that the circular was in fact a lottery, the proof demonstrated that it was not.

The three necessary elements of a lottery are the furnishing of a consideration, the offering of a prize and the distribution of the prize by chance rather than entirely upon a basis of merit. See, *Brooklyn Daily Eagle v. Voorhies*, 181 F. 579 (C.C.N.Y. 1910); *United States v. Pervis*, 195 F. 618 (D. C. Ga. 1912); *Eastman v. Armstrong-Byrd Music Co.*, 212 F. 622 (Okl. 1914); and *United States v. Wallis*, 58 F. 942 (D.C. Idaho 1893).

In *Peek v. United States*, 61 F.2d 973 (5th Cir. 1932), the Fifth Circuit defined a lottery as follows:

A lottery is usually defined as a scheme for the distribution of prizes or things of value by

lot or chance among persons who have paid or agreed to pay a valuable consideration for the chance to obtain a prize.

Here, the Government introduced into evidence, on the stipulation of counsel, a circular which was sent by Brimm to Linda Luzitano, Conrad Unrue, William Fields and Wanetta Parson.

The circulars sent to these individuals advertised that if they followed the directions of the advertisement they could potentially make \$625,000. The advertisement stated that in order to become a member of the club, the individual was required to send \$5 to the first name listed in the advertisement. In return for sending \$5 to the first name on the list, the individual would receive four valuable money-making reports. The advertisement also stated that in order to join the club, new members should send \$20 to International Enterprises. When the individual sent \$20 to International Enterprises within fourteen days he would receive a complimentary holiday for two in one of several cities including free hotel accomodations and entertainment.

In return for mailing the \$20 to International Enterprises, the individuals would also receive fifty copies of a similar advertisement and fifty names on a mailing list. Once they mailed the \$20, their name would appear second of three names listed in the advertisement. The individuals were told that when their name appeared in the first position, they would receive the \$5 membership fee from all new members.

An analysis of the "scheme" advertised in the circular clearly reveals that it was not a lottery or gift

enterprise. In order for a scheme to be considered a lottery or gift enterprise, a prize must be offered in such a manner that the person expecting to receive the prize has no control over whether he actually will win.

In this case, an individual who chose to become a member of the club was required to pay a \$5 membership fee and send \$20 to International Enterprises. In return for the \$5, he became a member and received four money-making reports. In return for the \$20, he received fifty copies of the advertisement which he received in the mail and fifty names on a mailing list. If an individual sent \$20 to International Enterprises within fourteen days, he received a prize of a holiday for two.

Therefore, the only prizes that International Enterprises offered in the advertisement were membership in the club, four money-making reports and a holiday for two. An individual could obtain these prizes merely by sending \$5 to the person whose name appeared first on the advertisement and by sending \$20 to International Enterprises within fourteen days of receipt of the advertisement.

The holding in *Peek v. United States*, is clear. If the winning of the prize is within the control of the individual then the scheme is not in fact a lottery. At trial, the Government argued that the prize was a potential \$625,000. Analysis of the advertisement shows that Brimm was the proprietor of the enterprise and that he profited by receiving \$20 from people who chose to join the club. In return, they received fifty similar advertisements, a mailing list with fifty names on it and a vacation for two. Receipt of the prizes was controlled directly by the person receiving the circular.

Brimm never advertised that he would give anything to anybody except those things. If an individual was going to receive \$625,000, it would come from potential new members, not International Enterprises.

In *Peek*, in a similar situation, the court held:

We do not think a case under the statute was made either by the thing charged or by those proven. The defendants were the proprietors of the enterprise and profited by receiving initiation fees and the expense fund, but they gave nothing to anybody by lot or otherwise, so no gift enterprise was involved nor anything similar to one. Neither was the scheme a lottery or similar thereto.

In the instant case, as a collateral incentive, the advertisement also provided that if individuals could convince other people to join the club they could make large sums of money. (This money would not be paid by International Enterprises, however.)

In determining whether this scheme is a lottery or not, it is helpful to compare it to contests held by fast food chains. Many fast food chains offer contests whereby a gameboard is received upon the purchase of any item sold at the restaurant. In return for purchasing the food item, the individual receives two things: (1) the food item purchased, and (2) the gameboard which offers fantastic prizes. Clearly, if an individual just paid for the gameboard, this scheme would be a lottery since an individual paid consideration for the potential of winning a prize over which he had no control. However, the fact that the individual also received the food item clearly

takes the scheme out of the definition of a lottery since the individual received something of value for the money, to-wit: the food item. The gameboard is considered an added incentive.

Similarly, in this case, for \$20 the individual received fifty advertising circulars, a mailing list with fifty names on it and a vacation for two. As with the purchase of a food item, there was no chance involved in receiving these awards. As an added incentive, the individual was told that he potentially could make large sums of money if other individuals joined the club. However, similar to the fast food contest, no lottery exists for the simple reason that for the \$20 sent to International Enterprises, the individuals did receive valuable items in return which were not conditioned on risk, luck or chance. Therefore, the enterprise created by Carl L. Brimm was not a lottery or gift enterprise.

The charges in the indictment in this case require that the Government establish at the outset that the enterprise advertised in the circular was a lottery. This it has not done. This Court should grant this petition and review this case within the context of the social advances that have taken place since this Court's last decision concerning lotteries in violation of 18 U.S.C. §1302, the 1952 decision in *United States v. Hulseth*.

II

THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, ALLOWING A CONVICTION TO STAND IN DEROGATION OF THE MEANING AND INTENT OF "DUE PROCESS" AS GUARANTEED BY THE FIFTH AMENDMENT IN THAT PETITIONER WAS CHARGED WITH VIOLATION OF THE LAW BY ONE METHOD, BUT THE GOVERNMENT PROVED UP VIOLATION BY ANOTHER METHOD.

Counts VI, VII, VIII and IX of the indictment each charged Carl L. Brimm with mailing an envelope containing a letter concerning a lottery in violation of 18 U.S.C. §1302 (see superseding indictment, Appendix "D"). Section 1302 clearly provides five separate ways to violate the law (see full text of Section 1302 in the Statutory Provision portion of this petition, *supra*).

One way of violating §1302 is to send a letter through the mail concerning a lottery. Another way is to send an advertisement of a lottery through the mail. In this case, the Government chose to charge Carl Brimm specifically with sending a letter concerning a lottery through the mail. He was not charged with sending an advertisement concerning a lottery through the mail.

The facts elicited at trial clearly established that the material was merely an advertisement rather than a letter concerning a lottery.¹ Since the Government specifically charged a violation of one method under the statute, but at best, proved a violation of the statute in a completely different way, a fatal variance was created. Thus, it is necessary for the Court to grant this petition to review the ruling below in order to remedy a serious injustice.

Count VI charges that on November 13, 1980, Carl Brimm knowingly deposited in the mail an envelope addressed to Linda Luzitano containing a letter concerning a lottery; Count VII charges that on November 11, 1980, Carl Brimm deposited in the mail an envelope addressed to Conrad Unrue containing a letter concerning a lottery; Count VIII charges that on November 29, 1980, Carl Brimm deposited in the mail an envelope addressed to William Fields containing a letter concerning a lottery; and Count IX charges than on October 31, 1980, Carl Brimm deposited in the mail an envelope addressed to Wanetta Parson containing a letter concerning a lottery.

By stipulation of counsel at trial, the Government introduced the four envelopes addressed to Luzitano, Unrue, Fields and Parson, together with the advertisement that was inside the envelope. The indictment did not allege nor did the evidence show that any of the four above-named individuals ever responded to the advertisement. Rather, the evidence

¹We do not concede that Carl L. Brimm is guilty of any violation of law. See I, *supra*.

established that upon receiving these circulars they turned them over to the postal authorities.

At trial, the Government presented the testimony of four other individuals who were not named in the indictment to establish that they did respond to a similar advertisement which they received in the mail. These individuals testified that upon paying the \$20.00, they received materials in the mail concerning an alleged lottery. It is important to remember that these four people were not named in the indictment nor was the fact that Brimm sent them materials concerning the lottery mentioned in the indictment. The Government only charged Carl Brimm with mailing four letters which were alleged to be letters concerning a lottery.

Pursuant to 18 U.S.C. §1302, there are five different categories of violations of the lottery law:

CATEGORY ONE: Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

CATEGORY TWO: Any lottery ticket or part hereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme

offering prizes dependent in whole or in part upon lot or chance;

CATEGORY THREE: Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

CATEGORY FOUR: Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

CATEGORY FIVE: Any article described in Section 1953 of this title.

Of the five categories set out in Section 1302, the Government chose to charge Carl Brimm with the first category, mailing a letter concerning a lottery. But the proof at trial as to the four individuals named in the indictment established at best that they received a circular advertising a lottery, which is in the fourth category, which was not charged in the indictment.

United States v. Halseth, 342 U.S. 277 (1952) is the most recent decision of this Court interpreting 18 U.S.C. §1301 (which is identical to 18 U.S.C. §1302). In *Halseth*, *supra*, the crime charged was exactly the same crime as in this case, to-wit: mailing a letter concerning a lottery or scheme offering a prize dependent on lot or chance. The *Halseth* facts showed that the defendant sent a circular that indicated how the addressee might obtain a free radio by selling chances on a punchboard and how certain lucky numbers would reward the purchaser with prizes of a radio and three pens. No merchandise was sent with the mailing. If the addressee desired to put the scheme into operation, the merchandise could be obtained by sending the full amount of cash as required in the circular. In holding that this circular was merely an advertisement of a lottery rather than a letter concerning a lottery, the Court held (342 U.S., 280-1):

In the instant case, too, the statute is penal and must be strictly construed. We hold that the words "concerning any lottery" mean an existing, going lottery or gambling scheme. The mailing does not purport to concern any existing lottery, and neither the addressee nor the appellee was engaged in the operation of a lottery or similar scheme. The lottery or scheme would come into existence only if the addressee put the paraphernalia into operation. The mere mailing of information concerning such schemes and how they may be set up or the mailing of paraphernalia for such schemes does not violate the statute in question.

The facts in this case are identical to the facts in *Halseth*. In both cases, the individuals named in the indictment only received a circular advertising a lottery. In both cases, the Government failed to introduce any evidence that the individuals ever received any of the actual material concerning an existing lottery.

The only evidence introduced at trial to show that Carl Brimm mailed any material concerning a lottery was adduced from witnesses T. Wilson, Church, C. Wilson and Searcy, who testified that they received the same advertisement that was received by Luzitano, Unrue, Fields and Parson, the individuals named in the indictment. However, they further testified that they mailed the money to the individuals named in the advertisement. In return for mailing the money, these individuals received material through the mail concerning the alleged lottery, to-wit: the mailing list which consisted of fifty (50) names and fifty (50) circulars advertising the lottery.

It is clear that the Government charged Brimm with mailing circulars concerning a lottery, but proved only that the four individuals named in the indictment received advertisements dealing with a lottery.

The Fifth Amendment of the United States Constitution states in part:

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or an indictment by a grand jury.

By charging Carl Brimm with mailing letters concerning a lottery to four individuals but proving that all he did as to these four people was mail an advertisement concerning a lottery (which is in a separate category of the statute), the court in essence allowed the indictment to be amended by someone other than the grand jury.

In *Russell v. United States*, 369 U.S. 749 (1961), this Court ruled that:

This underlying principle is effected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury unless the charge is merely a matter of form.

This stricture has developed from numerous decisions of this Court emphasizing the restrictions that both the common law and the constitution have placed upon the power of court and prosecution to change the charging part of the indictment to the jeopardy of the indictment.

In *Stirone v. United States*, 361 U.S. 212 (1960), this Court recognized that it is highly prejudicial for a defendant to be charged by indictment with committing one offense, and the court to allow the Government to prove another crime, not charged in the indictment. Quoting from *Ex parte Bain*, 121 U.S. 1, 13 (1811), the Stirone court wrote:

"If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called

to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed."

* * *

"... after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney . . ."

The fact that the Government introduced evidence that individuals not named in the indictment received mail concerning a lottery was clearly irrelevant to the charges. This permitted an amendment to the indictment which is prohibited. When the indictment charged Carl Brimm with mailing four letters concerning a lottery to four separate individuals, it was a fatal variance for the Government then to introduce evidence that the four individuals receiving the circulars only received an advertisement dealing with a lottery. It was also a fatal variance to allow the Government to sustain its proof by introducing four individuals not named in the indictment who may have received letters concerning a lottery.

Certainly, this is an important question of procedural due process under the Fifth Amendment which should be addressed by this Court.

CONCLUSION

For the foregoing reasons, Petitioner Carl L. Brimm respectfully prays that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,
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By: _____
Milton E. Grusmark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed to the Office of the United States Attorney, Attn: Karen L. Atkinson, A.U.S.A., 701 Clematis Street, West Palm Beach, Florida 33401, this _____ day of _____, 1983.

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Order of Denial of Rehearing	App. "C"
Superseding Indictment	App. "D"

Appendix

APPENDIX A

[RECEIVED JUL 18 1983]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6193

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JANICE A. BRIMM,
CARL L. BRIMM,

Defendants-Appellants.

Appeals from the United States District Court
For the Southern District of Florida

(July 12, 1983)

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

PER CURIAM:

Oral argument in this case was heard in Atlanta, Georgia on June 28, 1983. The court has considered the briefs, record and oral argument together with the government's confession of error with respect to Counts II, III, IV and V and on the basis of said consideration concludes that the evidence on Counts II, III, IV and V is not sufficient to support the conviction. In those counts defendants were charged with sending in the mail checks for the purpose of chance on a lottery. The evidence showed the mailing for deposit in a bank of proceeds from a lottery. Defendants' convictions and sentences on Counts II, III, IV and V are therefore reversed.

The judgments of conviction and sentences on all other counts are affirmed. See Circuit Rule 25.

AFFIRMED IN PART, REVERSED IN PART.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 81-6193

UNITED STATES OF AMERIA,

Plaintiff-Appellee,

versus

CARL L. BRIMM,

Defendant-Appellant

AMENDED PETITION FOR REHEARING

Appellant CARL L. BRIMM, through counsel and pursuant to Rule 26 of the Rules of the Eleventh Circuit, files this Amended Petition for Rehearing, amending page one, and states:

In its opinion of July 12, 1983, the panel overlooked and failed to consider the inescapable effect on Count I of the reversal of Counts II, III, IV and V.

The panel found that Counts II, III, IV and V charged Appellant with mailing the proceeds for a lottery for deposit in a bank. Appellant's conviction on those counts were reversed.

Count I contends that a conspiracy existed between Carl L. Brimm, Janice A. Brimm and Dolores R. Canton, as follows:

From a time to the Grand Jury unknown but prior to May 1979, to on or about December 5, 1980, in the Southern District of Florida, and elsewhere, the defendants

CARL L. BRIMM
JANICE A. BRIMM
and
DOLORES R. CANTON

did knowingly and wilfully combine, conspire, confederate, and agree with each other and others to commit the following offenses against the United States of America: (1) to knowingly deposit and send in the mail letters and circulars concerning a lottery, gift enterprise and similar scheme offering prizes dependent in whole or part upon lot or chance; and (2) to knowingly deposit and send in the mail checks, drafts and money orders for the purchase of a share and chance in a lottery, gift enterprise, and similar scheme offering prizes dependent in whole or in part upon lot and chance in violation of Title 18, United States Code, Section 1302. (Emphasis added)

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts were committed:

1. On or about August 27, 1979, the defendant Carl L. Brimm submitted an application for a Post Office Box in Stuart, Florida.
2. On or about February 5, 1980, Janice Brimm submitted an application for mail delivery through an agent to have N.A.T. Associates' mail delivered to 217 S.W. Cherry Hill Road, Port St. Lucie, Florida.
3. On or about June 23, 1980, the defendant Carl L. Brimm leased a building at 828 South 4th Street, Ft. Pierce, Florida.
4. On or about October 3, 1980, the defendant Carl L. Brimm mailed a registered article, No. 34445, valued at \$7,000 from Port St. Lucie to the First National Bank of Scotia, 201 Mohawk Avenue, Scotia, New York 12302.
5. On or about October 13, 1980, Dolores Canton contracted with mail agent United Office Services, Inc., 4651 Roswell Road, N. E. Atlanta, Georgia 30342 to have International Enterprises mail furnished to Dolores Canton at 269 S. W. Cherry Hill Road, Port St. Lucie, Florida 33452.

All in violation of Title 18, United States Code, Section 371.

Count II of the Indictment states:

On or about October 3, 1980, in St. Lucie County in the Southern District of Florida, the defendants

CARL L. BRIMM
JANICE A. BRIMM
and
DOLORES CANTON

did knowingly deposit and send in the mail checks, drafts, and money orders for the purchase of a share, chance and interest dependent on the event of a lottery, gift enterprise and similar scheme offering prizes dependent in whole or in part upon lot for chance: to wit, Registered Article #34445 addressed to the First National Bank of Scotia, 201 Mohawk Avenue, Scotia, New York in violation of Title 18, United States Code, Section 1302 and Title 18, United States Code, Section 2.

The indictment filed by the Grand Jury charges that the acts were committed in the conjunctive. Therefore, the Government was required to prove everything that was charged in the indictment.

Since this Court held that Counts II, III, IV and V showed the mailing for deposit in a bank of proceeds from a lottery, obviously Appellant cannot be guilty of conspiring to commit the acts charged in Count I.

If this Court finds that the disjunctive may be implied, Count I cannot stand. This necessarily follows since there is no way of knowing from the jury verdict whether they found Appellant guilty of those counts which still remain as opposed to the counts that this Court has struck.

WHEREFORE, it is respectfully requested that this Court reconsider its order and opinion of July 12, 1983 and upon such reconsideration modify its opinion by holding that Count I must necessarily fall, and the conviction on that count be reversed.

I HEREBY CERTIFY that a copy of the foregoing was mailed to the Office of the United States Attorney, 701 Clematis Street, West Palm Beach, Florida 33401, this 2nd day of August, 1983.

Law Offices of
MILTON E. GRUSMARK, P.A.
Attorneys for Appellant
3628 N.E. Second Avenue
Miami, Florida 33137
Tele.: (305) 576-6590

By: /s/ MILTON E. GRUSMARK
Milton E. Grusmark

APPENDIX C

[FILED SEP 6 1983]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6193

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JANICE A. BRIMM,
CARL L. BRIMM,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITIONS FOR REHEARING
(September 6, 1983)

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing
filed in the above entitled and numbered cause be and
the same are hereby Denied

ENTERED FOR THE COURT:
[Illegible]
United States Circuit Judge

APPENDIX D

[Filed June 8, 1981]

UNITED STATES OF AMERICA

v.

CARL L. BRIMM
JANICE A. BRIMM
DOLORES R. CANTON

NO. 81-8004-Cr-NCR(s)
18 U.S.C. 1302
M/S \$1,000 and/or 2 years
18 U.S.C. 371
M/S \$10,000 and/or 5 years
18 U.S.C. 2

SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT I

From a time to the Grand Jury unknown but prior to May 1979, to on or about December 5, 1980, in the Southern District of Florida, and elsewhere, the defendants

CARL L. BRIMM
JANICE A. BRIMM
and
DOLORES R. CANTON

did knowingly and wilfully combine, conspire, confederate, and agree with each other and others to commit the following offenses against the United States of America: (1) to knowingly deposit and send in the mail letters and circulars concerning a lottery, gift enterprises and similar scheme offering prizes dependent in whole or part upon lot or chance; and (2) to knowingly deposit and send in the mail checks, drafts and money orders for the purchase of a share and chance in a lottery, gift enterprise, and similar scheme offering prizes dependent in whole or in part upon lot and chance in violation of Title 18, United States Code, Section 1302.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts were committed:

1. On or about August 27, 1979, the defendant Carl L. Brimm submitted an application for a Post Office Box in Stuart, Florida.
2. On or about February 5, 1980, Janice Brimm submitted an application for mail delivery through an agent to have N.A.T. Associates' mail delivered to 217 S.W. Cherry Hill Road, Port St. Lucie, Florida.
3. On or about June 23, 1980, the defendant Carl L. Brimm leased a building at 828 South 4th Street, Ft. Pierce, Florida.
4. On or about October 3, 1980, the defendant Carl L. Brimm mailed a registered article, No. 34445, valued at \$7,000 from Port St. Lucie to the First National Bank of Scotia, 201 Mohawk Avenue, Scotia, New York 12302.

5. On or about October 13, 1980, Dolores Canton contracted with mail agent United Office Services, Inc., 4651 Roswell Road, N.E., Atlanta, Georgia 30342 to have International Enterprises mail furnished to Dolores Canton at 269 S.W. Cherry Hill Road, Port St. Lucie, Florida 33452.

All in violation of Title 18, United States Code, Section 871.

COUNT II

On or about October 3, 1980, in St. Lucie County in the Southern District of Florida, the defendants

CARL L. BRIMM
JANICE A. BRIMM
and
DOLORES CANTON

did knowingly deposit and send in the mail checks, drafts, and money orders for the purchase of a share, chance and interest dependent on the event of a lottery, gift enterprise and similar scheme offering prizes dependent in whole or in part upon lot or chance: to wit, Registered Article #34445 addressed to the First National Bank of Scotia, 201 Mohawk Avenue, Scotia, New York in violation of Title 18, United States Code, Section 1302 and Title 18, United States Code, Section 2.

COUNT III

On or about October 14, 1980, in St. Lucie County
in the Southern District of Florida, the defendants

CARL L. BRIMM
JANICE A. BRIMM
and
DOLORES CANTON

did knowingly deposit and send in the mail checks,
drafts, and money orders for the purchase of a share,
chance and interest dependent on the event of a lottery,
gift enterprise and similar scheme offering prizes
dependent in whole or in part upon lot or chance: to
wit, Registered Article #9532 addressed to the First
National Bank of Scotia, 201 Mohawk Avenue, Scotia,
New York in violation of Title 18, United States Code,
Section 1302 and Title 18, United States Code, Section
2.

COUNT IV

On or about October 14, 1980, in St. Lucie County
in the Southern District of Florida, the defendants

CARL L. BRIMM
JANICE A. BRIMM
and
DOLORES CANTON

did knowingly deposit and send in the mail checks,
drafts, and money orders for the purchase of a share,
chance and interest dependent on the event of a lottery,

gift enterprise and similar scheme offering prizes dependent in whole or in part upon lot or chance: to wit, Registered Article #9533 addressed to the First National Bank of Scotia, 201 Mohawk Avenue, Scotia, New York in violation of Title 18, United States Code, Section 1302 of Title 18, United States Code, Section 2.

COUNT V

On or about November 15, 1980, in St. Lucie County in the Southern District of Florida, the defendants

CARL L. BRIMM
JANICE A. BRIMM
and
DOLORES CANTON

did knowingly deposit and send in the mail checks, drafts, and money orders for the purchase of a share, chance and interest dependent on the event of a lottery, gift enterprise and similar scheme offering prizes dependent in whole or in part upon lot or chance: to wit, Registered Article #8563 addressed to the First National Bank of Scotia, 201 Mohawk Avenue, Scotia, New York in violation of Title 18, United States Code, Section 1302 and Title 18, United States Code, Section 2.

COUNT VI

On or about November 13, 1980, in the Southern District of Florida, the defendants

CARL L. BRIMM
JANICE A. BRIMM
and
DOLORES CANTON

knowingly did deposit in an authorized depository for mail matter, to be delivered by the United States Postal Service, an envelope addressed to Linda R. Luzitano, 2146 N. 1600 E., Layton, Utah 84041, containing a letter concerning a lottery, gift enterprise, and similar scheme offering prizes dependent in whole or in part upon lot or chance, that is, the offering of International Enterprises, Order Department, 4651 Roswell Rd., N.E., Atlanta, Georgia 30342, all in violation of Title 18, United States Code, Section 1302 and Section 2.

COUNT VII

On or about November 11, 1980, in the Southern District of Florida, the defendants

CARL L. BRIMM
JANICE A. BRIMM
and
DOLORES CANTON

knowingly did deposit in an authorized depository for mail matter, to be delivered by the United States Postal Service, an envelope addressed to Conrad Unrue, Box 672, Payette, Idaho 83661, containing a letter concerning a lottery, gift enterprise, and similar scheme offering prizes dependent in whole or in part upon lot or chance, that is, the offering of International Enterprises, Order Department, 4651 Roswell Rd., N.E., Atlanta, Georgia

30342, all in violation of Title 18, United States Code, Section 1302 and Section 2.

COUNT VIII

On or about October 29, 1980, in the Southern District of Florida, the defendants

CARL L. BRIMM
JANICE A. BRIMM
and
DOLORES CANTON

knowingly did deposit in an authorized depository for mail matter, to be delivered by the United States Postal Service, an envelope addressed to William H. Fields, Box 45, Waynetown, Indiana 47990 containing a letter concerning a lottery, gift enterprise, and similar scheme offering prizes dependent in whole or in part upon lot or chance, that is, the offering of International Enterprises, Order Department, 4651 Roswell Rd., N.E., Atlanta, Georgia 30342, all in violation of Title 18, United States Code, Section 1302 and Section 2.

COUNT IX

On or about October 31, 1980, in the Southern District of Florida, the defendants

CARL L. BRIMM
JANICE A. BRIMM
and
DOLORES CANTON

knowingly did deposit in an authorized depository for mail matter, to be delivered by the United States Postal Service, an envelope addressed to Wanetta Parson, Route 1, Box 180, Rising Star, Texas 76471, containing a letter concerning a lottery, gift enterprise, and similar scheme offering prizes dependent in whole or in part upon lot or chance, that is, the offering of International Enterprises, Order Department, 4651 Roswell Rd., N.E., Atlanta, Georgia 30342, all in violation of Title 18, United States Code, Section 1302 and Section 2.

A TRUE BILL

/s/ Roger R Parenteau

FOREPERSON

/s/ Atlee W. Wampler, III
ATLEE W. WAMPLER, III
UNITED STATES ATTORNEY

BY: /s/ Karen L. Atkinson
KAREN L. ATKINSON
ASSISTANT UNITED STATES ATTORNEY